Supreme Court, U.S.
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No. 05-65

In The Supreme Court of the United States

VICTOR LOMMEN,
natural father of Joshua Lommen, and
JOSHUA LOMMEN, a minor,

Petitioners,

v.

JOHN FRANCIS MCINTYRE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States District Court for the Eastern District of Michigan err or abuse its discretion in *sua sponte* declining federal question jurisdiction under 28 U.S.C. §1331(a), and refusing reconsideration, after first having accepted jurisdiction, where Petitioners, biological parents of a child as scientifically established through a blood test, sought federal court declarations that their constitutionally protected rights of family relationship and family integrity are being violated through refusal by the state courts of Michigan and by Respondent to recognize the fact of that paternity?

2. Assuming the District Court had federal question jurisdiction, does the District Court have authority to issue a declaratory judgment or an injunction to enforce Petitioners' constitutionally protected rights of family relationship and family integrity?

3. Assuming the District Court had federal question jurisdiction and authority to grant injunctive and declaratory relief, was the District Court precluded from acting by the operation of any abstention doctrines?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

As to Petitioners--Joshua Lommen, as stated in the caption of this Petition. Also as Petitioners in this ("in re") matter is his biological father, Victor Lommen, as stated in the Complaint filed with the United States District Court for the Eastern District of Michigan. Further, Kim Lommen, Joshua's biological mother, although not named in the caption of the Complaint, was named in the Complaint and can be considered an additional party to this proceeding.

As to Respondent--John Francis McIntyre.

There are no other parties.

No federal governmental entity or agency, and no State executive branch agency, was a party to the matter below or is a party to this Petition.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2004

***IN RE*: JOSHUA LOMMEN**

Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICTOR LOMMEN, KIM LOMMEN, and JOSHUA LOMMEN, Petitioners, by undersigned counsel, under appropriate Rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Court of Appeals for the Sixth Circuit, in an unpublished opinion issued March 10, 2005, determined the United States District Court for the Eastern District of Michigan properly denied federal court jurisdiction over Petitioners' Complaint. Petitioners Victor Lommen and Kim Lommen were seeking federal declaratory and injunctive relief based upon the already-established fact that they are the biological parents of Joshua Lommen, a fact which Michigan state courts in previous divorce and custody proceedings have not recognized. Petitioners were not seeking for the federal court to determine paternity or otherwise to directly intervene in any state proceedings (no state proceedings were pending). Nevertheless, the District Court declined to exercise jurisdiction, although the Court initially had determined that jurisdiction was proper.

The Sixth Circuit also decided that the District Court properly denied Petitioners' reconsideration motion reiterating these jurisdictional issues, because the reconsideration motion was not filed within 10 days from the District Court's order denying jurisdiction and dismissing the Complaint. The Sixth Circuit determined that, since the appeal was only from the denial of the reconsideration motion and under limited review in such circumstances, the District Court was deemed to have appropriately denied the reconsideration motion.

GROUNDS FOR JURISDICTION

The Court of Appeals for the Sixth Circuit issued an Opinion (unpublished) in *Victor Lommen, et al. v. John Francis McIntyre*, on March 10, 2005, affirming the action of the District Court of the Eastern District of Michigan, dismissing Petitioners' Complaint for lack of federal question jurisdiction. No post-decision motions were filed, such as motion for reconsideration or rehearing or for rehearing en banc. In accordance with Supreme Court Rule 13.3, this Petition is filed within 90 days of the date of that Opinion.

Jurisdiction of this Court is invoked through 28 U.S.C. §1254(1).

There are no notification required under Rule 29.4(b).

STATUTES OR PROVISIONS INVOLVED

[text appears in Appendix to Petition]

United States Constitution, Fourteenth Amendment

28 U.S.C. §1331

28 U.S.C. §1367

28 U.S.C. §2201

STATEMENT OF THE CASE

This appeal is from a decision of the Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirming the District Court for the Eastern District of Michigan (Steeh, J.) ("District Court"), in declining to exercise federal question jurisdiction over relief sought by Petitioners, Victor Lommen

and Joshua Lommen (and by implication, Kim Lommen) ("Mr. Lommen," "Ms. Lommen," "the Lommens," or "Petitioners"). The relief was described in a Complaint for declaratory and injunctive relief.

The Complaint was directed to John Francis McIntyre ("Mr. McIntyre" or "Respondent") and implicated the State courts of Michigan. Although the Lommens reside in Illinois and Mr. McIntyre resides in Michigan, the Complaint did not invoke federal jurisdiction based on diversity of citizenship. Jurisdiction was based upon federal question.

At issue is the Lommens' request that the District Court require Mr. McIntyre and the Michigan courts *to recognize* that the Lommens *are* the natural parents of Joshua Lommen ("Joshua" or "the child"). The paternity question has been resolved by an incontrovertible blood test. The Lommens were *not* seeking federal evidentiary determination of paternity--that fact is established. If the District Court were to provide relief sought by the Lommens, declare the fact of the paternity, and declare that the Lommens' constitutional rights of family relationship are being violated by the refusal of the Michigan courts and of the Respondent to recognize that paternity, the Lommens then would proceed *in State court* to further their rights as to custody, visitation, and similar matters concerning Joshua.

The procedural background in the District Court was short (however, state court proceedings have been extensive). There was no hearing, trial, depositions, or discovery.

The Lommens filed their Complaint for Declaratory Judgment and Injunctive Relief on May 16, 2003. The Complaint was not yet served when on or about May 30, 2003, the Court directed the Plaintiffs to show cause why the District Court should exercise federal question jurisdiction.

On June 16, 2003, the Lommens submitted a short statement describing the basis for jurisdiction. On July 8,

2003, after receipt of that statement, the District Court dismissed its show cause order and determined jurisdiction existed. The Lommens again proceeded to have the Complaint served.

Just two days later, on July 10, 2003, the Court reversed itself, *sua sponte*. It issued a two-page Order deciding jurisdiction did not exist. It dismissed the case.

The Lommens, on August 19, 2003, sought reconsideration of this Order. (This reconsideration motion was filed more than ten days after the District Court's order dismissing for lack of jurisdiction, but raised identical issues). On August 20, 2003, just one day after the reconsideration motion was filed, the Court denied the reconsideration motion, on the basis that it was not timely filed.

On September 19, 2003, the Lommens timely appealed. There were some delays in pursuing the appeal while they withdraw a previously submitted brief by former counsel and retained other counsel.

On March 10, 2005, the Sixth Circuit affirmed the District Court's action.

STATEMENT OF MATERIAL FACTS

Appellants did not have the opportunity before the District Court to develop the factual background. Their action did not proceed beyond filing of the Complaint. Service of the Complaint had not been effectuated by the time the District Court *sua sponte* dismissed for lack of jurisdiction, and denied reconsideration.

Nevertheless, the background was alluded to in the Complaint and much of it is undisputed. Solely to provide a context by which this Court can consider Petitioners' contentions that the District Court erred or abused its discretion in denying their reconsideration motion and in declining jurisdiction, Petitioners present a summary of this background, concentrating on undisputed factual or

procedural aspects.

John McIntyre and Kim McIntyre (Lommen) were married in October of 1983. They had two children, John (born March 18, 1984) and Rebekah (born May 9, 1986). At that time, the McIntyre family lived in Michigan.

During Kim (McIntyre) Lommen's marriage to John McIntyre, she began a relationship with her (now husband) Victor Lommen. From this relationship, Joshua was born on December 26, 1991. John McIntyre may have believed that he was the child's father, but it is undisputed that Joshua is the child of Kim (McIntyre) Lommen and Victor Lommen.

By this point, the marital situation between Kim (McIntyre) Lommen and John McIntyre was declining and, soon afterwards Joshua's birth, led to divorce. Mr. McIntyre initiated divorce proceedings in March, 1992 (Circuit Court of Michigan for Wayne County). Ms. McIntyre moved out of the house. This began a series of court proceedings and orders, affecting the family, particularly Joshua.

A final divorce judgment was issued by the Michigan court on October 2, 1992. Among other things, it granted joint physical custody of all three McIntyre children (John, Rebekah, and Joshua), to John McIntyre and to Kim (McIntyre) Lommen (with limited visitation to Victor Lommen as to Joshua). Such a decree and custody order suggests a legal presumption that Joshua is the biological child of the McIntyre marriage. However, that is not the case.

Although a divorce was granted, for the benefit of the children Kim (McIntyre) Lommen moved back in with Mr. McIntyre in early 1993 (living in separate parts of that house). However, she married Victor Lommen on January 6, 1993 and moved out of the McIntyre home permanently, in early 1993.

Kim Lommen and Victor Lommen had a child of their own, Jacob (born March 1, 1993). When she left the

McIntyre residence, she resided in Michigan with Mr. Lommen and their child. Mr. Lommen's job subsequently took them to Illinois. The Lommens since have had other children of their own--these children thus are all Joshua's siblings, but to date he has had little contact with them. (Mr. Lommen also has a daughter from a previous marriage.)

Victor Lommen, seeking to bring Joshua into the Lommen family, filed a paternity and custody action in the Michigan court seeking a declaration that Joshua is his son. On June 19, 1993, that claim was dismissed (apparently relying upon the legal presumption that a child born during a marriage is the child of that marriage).

In the Fall of 1993, Mr. McIntyre modified the custody arrangement for the Lommen children, which included Joshua. This was due to an incident in which Kim Lommen, when she was with Joshua for her visitation, determined that Joshua was being physically neglected by Mr. McIntyre. She did not return Joshua, but instead went with Joshua to a relative's house in Ohio. Mr. McIntyre located Ms. Lommen and Joshua, arranged for them to return to Michigan, and filed a motion seeking sole custody. That effort was successful. On November 24, 1993, the Michigan (Wayne County) Court awarded Mr. McIntyre sole custody of all three McIntyre children, including Joshua, with visitation by Kim Lommen on alternate weekends. (Thus explicitly or by implication rejecting the concerns raised by Ms. Lommen about treatment of Joshua.) In addition, this modified custody order required Kim Lommen to exercise her visitation with these children, including Joshua, within the State of Michigan only. Ms. Lommen objected to the Michigan court's declaring Mr. McIntyre to be the sole custodian of a child, Joshua, which she (and Mr. Lommen) knew not to be his, and to the court's visitation restrictions.

The issue of paternity would again be raised. A blood/

DNA test was conducted at Sparrow Hospital in Lansing, Michigan on April 18, 1994 (report dated May 9, 1994). That test conclusively showed that, to a 99.9998% probability, Victor Lommen is Joshua's father. The test report stated, "Paternity is practically proved." (This test result was to have been attached as an Exhibit to the Complaint in the United States District Court. See Complaint at ¶6. The record does not reflect whether that Exhibit was so included. Nevertheless, the parties do not dispute the test result.)

There can be no dispute that Victor Lommen is Joshua's father. However, the Michigan courts so far have declined to accept this uncontroverted fact or to give it appropriate judicial recognition and weight.

In late 1995, following the blood test, Victor Lommen and Kim Lommen sought relief from other courts and filed a separate paternity action in a State court in Illinois (Cook County), where they resided. That court, considering the blood test, issued an Agreed Judgment of Paternity on February 14, 1996. The Illinois court thus ruled that Joshua is the child of Victor Lommen and Kim (McIntyre) Lommen. The court awarded custody of Joshua to the Lommens. The court expressly continued jurisdiction over the matter.

Following this Illinois ruling, in late February of 1996--according to later pleadings by Mr. McIntyre in the Michigan court--Kim Lommen, while having the three children (John, Rebekah, and Joshua) for visitation, returned John and Rebekah, but took Joshua back with her to Illinois. She gave Mr. McIntyre a copy of the Illinois court Order declaring Joshua to be the child of the Lommens and awarding custody of Joshua to the Lommens.

Mr. McIntyre immediately sought relief regarding the Illinois court orders. He challenged the orders in that court, but the Illinois Court upheld it. Mr. McIntyre then went to the Michigan (Wayne County) Court. He contended the

Illinois paternity and custody orders were entered without reference to the prior Michigan orders, without notice to him, and otherwise were without jurisdiction or defective. In March, 1996, the Michigan (Wayne County) court directed that Kim Lommen return Joshua. When she appeared before the Michigan Court after being served with that Order but without Joshua, she was incarcerated until Joshua was returned to Mr. McIntyre (despite the fact that Ms. Lommen was four months' pregnant and ill at the time). Joshua was brought to the Michigan court and was delivered to Mr. McIntyre. Ms. Lommen was released.

Afterwards, upon further motion by Mr. McIntyre, the Illinois (Cook County) paternity and custody orders were voided by the Michigan (Wayne County) court. The Michigan court determined, among other things, that the Illinois court did not have jurisdiction to issue those orders.

The Lommens thereafter sought relief from the Michigan Court, directly. In July, 1996, they filed a paternity and custody petition in the Michigan (Wayne County) court, regarding Joshua. This began a protracted and hotly contested proceeding. After that proceeding, the Michigan court denied all relief sought by the Lommens concerning Joshua--despite the still-uncontroverted 1994 blood test absolutely establishing that Joshua is the child of the Lommens.

The details of that 1996 proceeding are outside this limited summary of the background. Petitioners note that the Michigan court denied an evidentiary hearing, imposed supervised visitation upon Kim Lommen regarding the McIntyre children including Joshua, and denied Victor Lommen contact with the McIntyre children, including Joshua.

Following this last attempt by the Lommens in the Michigan court to have Joshua declared to be their child and to modify custody, no additional State court proceedings have

been initiated by them, in Illinois or in Michigan. For nearly nine years since then, the Lommens have attempted to manage with the situation, while Mr. McIntyre, protected by the actions and orders of the Michigan court, essentially raises Joshua (who is in his mid-teenage years) as his own son--when he is not Joshua's father.

The Lommens, however, continue to pursue a means to achieve judicial recognition by the Michigan courts of a simple biological fact--that Joshua is their son. Such a recognition could then be accompanied by appropriate legal relief in the Michigan court, which finally could bring all of the Lommen children under one roof. Yet, they realize that, without more, another return by them to the Michigan courts on these issues is likely to be futile. At every opportunity, the Michigan court has denied any relief they have sought and has steadfastly refused to give appropriate judicial acknowledgement and weight to the fact that Victor Lommen, rather than John McIntyre, is Joshua's father.

Consequently, on May 16, 2003, Victor Lommen filed a Complaint for Declaratory and Injunctive Relief in the District Court for the Eastern District of Michigan. [See Appendix to this Petition, Exhibit 8, at 18a]. Jurisdiction was not based upon diversity, but upon federal question--that is, the violation by Mr. McIntyre and by the Michigan court of the Lommens' constitutionally protected Fourteenth Amendment Due Process right in parental and family relations, concerning Joshua, as well as Joshua's own rights in this regard. The Complaint noted, in short outline form, some of the factual background which has been described.

The Complaint alleges that McIntyre "has refused to acknowledge that Lommen is Joshua's natural father. He has also refused to accept the results of the DNA test." [Appendix to Petition, Exhibit 8, Complaint at ¶11]. The Complaint also states: "The controversy has constitutional

dimensions because neither Lommen or Joshua [have] been allowed to assert their federal constitutional right of parental autonomy or family integrity in various court hearings in Wayne County, Michigan, as explicated in numerous United States Supreme Court decisions [citations omitted], a right grounded in the First Amendment's broad right of association and the Fourteenth Amendment's general substantive due process protections." [Appendix to Petition, Exhibit 8, Complaint at ¶12]. The Lommens sought that the District Court: 1) declare Victor Lommen is Joshua's natural father, 2) declare "the relationship between Joshua and Victor Lommen is constitutionally protected under the First and Fourteenth Amendments," and order Mr. McIntyre "not to interfere in the exercise of Victor's and Joshua's federal constitutional right." [Appendix to Petition, Exhibit 8, Complaint at p. 3].

Thus, Victor Lommen (and by implication Kim Lommen) did not seek to utilize the federal court re-try custody issues, which is acknowledged to be a State court matter. Neither did they intend to initiate a protracted federal court proceeding. Rather, they sought limited federal relief for a declaration of the fact of paternity consistent with their constitutional rights of paternity and of family integrity, to then be utilized in State court proceedings in Michigan on custody and related matters. Any State proceedings re-initiated by the Lommens must reflect a threshold judicial recognition by the Michigan Court and by Mr. McIntyre that Joshua is the natural child of the Lommens.

Soon after the Complaint was filed (and before it could be served) the District Court (Steeh, J.) questioned jurisdiction. By Show Cause Order, the court stated that it intended to "dismiss this case on its own motion for lack of jurisdiction, unless Petitioners can demonstrate that the Court does have jurisdiction in this case." Petitioners were given to

June 16, 2003 to explain jurisdictional bases for the Complaint. [Appendix to this Petition, Exhibit 2, Show Cause Order, at 8a].

On that date, the Lommens submitted a response. They stated that they "sue to vindicate their constitutional right to what has been called the right of parental autonomy or the right to family integrity under the United States Constitution. Therefore, the court's federal jurisdiction is invoked." The response stated that a parent "has a constitutionally protected right to 'bring up children' grounded in the Fourteenth Amendment's due process clause and First Amendment's right of association." Parents "have the 'primary role' in the 'nurture and upbringing of their children.'" The response noted this right is recognized by the Supreme Court as a fundamental right and liberty interest.

The response stated the gravamen of the declaratory relief sought is the federal constitutional claim. The state law issue of who is Joshua's natural father "is ancillary to the pivotal federal question of the federal constitutional right." (The response contains a certification that it was mailed to Appellee Mr. McIntyre).

Following this response, the District Court, by Order of July 8, 2003, dismissed the show cause order and accepted jurisdiction. The Order stated, "it appears that petitioners' cause of action seeking a declaration that Lommen is the natural father of Joshua McIntyre presents a federal question." [Appendix to this Petition, Exhibit 3, Order Dismissing Show Cause, at Apx. 10a].

Jurisdiction having been accepted and established, the Lommens again proceeded with service of the Complaint. However, just two days after the District Court's Order accepting jurisdiction, the Court rejected jurisdiction, *sua sponte*. By Order of July 10, 2003, the Court found there was no jurisdiction, stating:

> Based on these such [Supreme Court] cases, the Court found that petitioner had presented a federal question. On further reflection, the Court reconsiders that decision *sua sponte*, and finds that there is no constitutional right to have the issue of paternity determined by a federal court.
>
> State statutes regulate paternity, and certain presumptions about paternity follow from divorce laws. Furthermore, there is a wealth of case law that has developed from the application of such laws and statutes in each state. Matters of paternity are for the state courts, at least initially.
>
> While the Constitution provides certain protections to parental rights, the complaint at issue does not allege that any of these rights have been violated. If there is a challenge to a paternity law's constitutionality after it has been applied to a particular individual, such a challenge might appropriately be made in the federal courts. However, that is not the case with the petitioner's cause of action seeking a declaration of paternity in this case.

[Appendix to this Petition, Exhibit 4, Order Reconsidering Dismissal of Show Cause, at Apx. 11a].

On August 19, 2003, Petitioners sought reconsideration. (As noted, this motion was filed more than 10 days after the Court's Order denying jurisdiction). Petitioners stated in their reconsideration motion that under the doctrine of pendant jurisdiction, once jurisdiction has been acquired by virtue of a federal question, a federal court may decide any issue necessary to the disposition of the case, if those issues derive from a common nucleus of operative fact or are closely tied to the federal question. The reconsideration motion added [citations omitted]:

> The present case is one of those situations. The federal constitutional right 'to bring up children' is a fundamental liberty interest that requires the highest level of constitutional review, strict scrutiny. The federal courts are the most appropriate form to vindicate this interest. State courts in Illinois and Michigan have been pusillanimous in enforcing the petitioners' federal rights. The petitioners have asserted a non-frivolous federal question claim. That claim undergirds the Court's jurisdiction so that the Court has jurisdiction to decide the state law claim. Paternity has been proved. Petitioners have filed the results of DNA testing, a test universally accepted as scientifically accurate and reliable.

The District Court denied the reconsideration motion, on the basis of timeliness. The court noted a reconsideration motion is to be filed within 10 days of the judgment or order involved. Because the motion was not so filed, it was denied. [Appendix to this Petition, Exhibit 5, Order Denying Motion for Reconsideration, at Apx. 13a]. (The Court did not treat the reconsideration motion as a motion for relief of judgment under Fed.R.Civ.Pr. 60(b).)

On September 19, 2003, Victor Lommen timely noted an appeal to the Court of Appeals for the Sixth Circuit. Reviewing the matter initially, upon Respondent's motion to dismiss, the Court issued an Order that appellate jurisdiction

may be exercised over the denial of the reconsideration motion (which raised the precise issues as raised in the Complaint and in the response to show cause). [Appendix to this Petition, Exhibit 6, Order of Sixth Circuit, at Apx. 14a].

On May 10, 2005, the Sixth Circuit issued an Opinion affirming the District Court. [Appendix to this Petition, Exhibit 1, Sixth Circuit Opinion (unpublished), at Apx. 1a]. Although the Court concentrated on procedural matters as to the context of the appeal, as an appeal from denial of a reconsideration motion, it was clear nonetheless that as to the core jurisdictional issue, the Opinion took the same approach as the District Court. The Court declared domestic relations matters ordinarily are not subject to federal jurisdiction. Thus, the Lommens were left without a federal court remedy.

REASONS FOR GRANTING WRIT

I. FEDERAL QUESTION JURISDICTION EXISTED REGARDING THE RELIEF SOUGHT BY PETITIONERS IN THEIR COMPLAINT, REQUESTING A DECLARATION BY THE FEDERAL COURT OF CONSTITUTIONALLY RECOGNIZED PARENTAL RIGHTS.

This Court consistently has declared the family relationship, and parental contact with and raising of children, to be fundamental interests entitled to constitutional protection from public or private violation or interference. In their Complaint, Petitioners properly allege and describe that interest and the violation of it by Respondent (and, as well, by the Michigan Court). Therefore, federal question jurisdiction was properly invoked. The District Court erred in declining jurisdiction and in denying the reconsideration motion, and the Sixth Circuit erred in affirming that finding.

A. Impropriety of Sua Sponte Dismissal

At the outset, Petitioners note that it was inappropriate for the District Court to have *sua sponte* dismissed this matter for lack of jurisdiction, after having already accepted jurisdiction. By issuing its show cause order concerning jurisdiction, the District Court recognized Sixth Circuit guidelines for dismissal on this basis (which include notification to the parties of the court's intent to dismiss for lack of jurisdiction and allowing parties to respond or to amend their complaint). Acceptance of jurisdiction, followed by *sua sponte* refusal of jurisdiction, is just the type of action by a district court that is characterized as "disfavored." *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983).

Therefore, once having accepted jurisdiction, a district court should be restricted from declining jurisdiction unless there has been some change of circumstances, claims, parties, or other bases of the case which would require a further consideration of jurisdictional aspects. Here, the Order dismissing the case for lack of jurisdiction came only days after the Order accepting jurisdiction. There was no change of any circumstances, parties, or claims. Nor did the Court identify any such change. By this situation alone, the District Court's dismissal for lack of jurisdiction was questionable.

B. General Principles and Supreme Court Cases

In *Stanley v. Illinois*, 405 U.S. 645 (1971), reversing then-existing Illinois standards for determining the status of children born out of wedlock which presumed an unwed father to be an unfit parent, this Court commented upon and recognized the immediate and crucial interests involved. It stated [405 U.S. at 651-652, citations omitted]:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'
>
> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious... than property rights.' 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.
>
> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying nature, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the

> right of other children because familial [bonds] in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. 'To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.'

Citing, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, *May v. Anderson*, 345 U.S. 528 (1953); and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The *Stanley* Court characterized the interest in retaining custody of children "cognizable and substantial." The Court said that in reviewing the State process it was not evaluating the legitimacy of the State's interests, but determining "whether the means used to achieve these ends are constitutionally defensible." The Court noted that merely because the petitioner was an unmarried father does not by itself mean that he cannot properly care for his children. 405 U.S. at 653-655. Of particular interest here is the *Stanley* Court's further statement (405 U.S. 656-657):

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

In *May v. Anderson*, *supra*, noted by *Stanley*, and deciding full faith and credit should not have been granted by an Ohio court of a custody order from a Wisconsin court obtained by a father without the mother's involvement in

those custody proceedings, the Court commented, "Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody." 345 U.S. at 533. In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), reviewing New York procedures for removing foster children from foster homes, this Court stated basic constitutional protections encompassing the family unit do not necessarily depend upon blood relationships but can rest upon other factors including the nature of the family unit, societal recognition of deep relationships existing between adult and child, and a general right to privacy. See discussion at 431 U.S. at 842-845. Thus, even without a blood relationship, the importance of the family unit is entitled to constitutional recognition.

Also, in *Santosky v. Kramer*, 455 U.S. 745 (1982), decided 10 years after *Stanley*, this Court found lacking New York state procedures to terminate parental rights in adoption or similar proceedings, and noted "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." 455 U.S. at 753, and numerous cases cited. The Court also stated:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

The *Santosky* court said it is "plain beyond the need for multiple citation" that a natural parent's desire for, and right to, the companionship, care, custody, and management of children is an interest "far more precious than any property right." 455 U.S. at 758-759, quoting, e.g., *Stanley*. Until a parent is deemed unfit, the child and its parents "share a vital interest in preventing erroneous termination of their natural relationship." 455 U.S. at 760, footnote omitted.

Further, in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), the Court, considering and reviewing the long-developed domestic relations "exception" to diversity jurisdiction, limited that exception to situations in which plaintiffs seek federal relief in the nature of divorce, alimony, or custody. Therefore, the Court suggested there are no mandatory limits on federal jurisdiction simply because there may be a domestic relations background to the claims brought to the federal court. (See Blackmun, J., concurring).

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court found an indigent mother must be allowed to waive record preparation and transcript fees to appeal a decision terminating her parental rights, and again commented upon the central constitutional protection of family integrity. It noted, "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic important in our society,' rights sheltered against the State's unwarranted usurpation, disregard, or disrespect." 519 U.S. at 116. The Court again stated parental interests are "commanding" and "far more precious than any property right" and that the interests of parents in relationship with their children "is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." 519 U.S. 119, citing, e.g., *Santosky*.

These well established principles were reiterated in

general, in this Court's recent decision of *Elk Grove Unified School District v. Newdow*, 542 U.S. ____, 159 L.Ed.2d 98 (2004), involving whether the phrase "under God" in the pledge of allegiance, when recited in public schools, violates the First Amendment Establishment Clause. Although the *Elk Grove* matter did not deal with the issues in this present Petition, this Court mentioned the "fragile, complex, and interpersonal bonds between a child and parent" (see 159 L.E.2d at 112, citing other authority), and noted that children themselves have "constitutionally protectible interests." See fn. 7, citing, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Douglas, J., dissenting). Further, a concurring opinion in *Elk Grove* pointed out that not even the longstanding domestic relations exception to diversity jurisdiction should prevent a federal court from reaching a matter involving a "substantial federal question." (Rehnquist, C.J., citing *Ankenbrandt, supra*, and *Palmore v. Sidoti*, 466 U.S. 429 (1984)). For another recent decision on the significance of family relationships or domestic arrangements within the context of the Fourteenth Amendment Due Process Clause, see *Lawrence v. Texas*, 539 U.S. ____, 156 L.E.2d 508 (2003).

These decisions unequivocally establish a constitutionally-protected interest in the relationship between a parent and a child and in the integrity of the family unit. Violation of that relationship by deliberate denial of the relationship or by procedures negatively affecting it which are not consistent with due process, are proper subjects for federal court concern and appropriate relief. Thus, concerns regarding violation of the parent and child relationship present a federal question for federal question jurisdiction.

C. Sixth Circuit Decisions, Other Courts

This Sixth Circuit's decision, further, was contrary to other decisions in which jurisdiction of this type of matter is recognized or otherwise was not controlled other decisions

finding otherwise but which are distinguishable. The Sixth Circuit, in finding the District Court properly denied jurisdiction, cited *Firestone v. Cleveland Trust Co.*, 654 F.2d 1215 (6th Cir. 1981), at 1215-1216. Yet, that decision discussed the domestic relations exception to diversity jurisdiction, and commented that because state courts have "historically have decided these matters, they have developed a proficiency and expertise in these cases and a strong interest in disposing of them." (Citations omitted). That is not the situation here. See also other distinguishable Sixth Circuit decisions, e.g., *Holloway v. Brush*, 220 F.3d 767 (6th Cir. 2000) (denying plaintiff opportunity through action under 42 U.S.C. §1983 to "strong arm" Ohio state courts in custody matter, which was then pending); *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (deciding state courts are proper venues for determining adoption issues arising from "Operation Babylift" of Vietnam war orphans), and *Zak v. Pilla*, 698 F.2d 800 (6th Cir. 1982) (ruling district court properly denied jurisdiction in §1983 action alleging arbitrary refusal by adoption agency to approve plaintiffs' adoption application).

Nevertheless, even *Firestone* said that a federal court, when considering whether to exercise jurisdiction, must "sift through the claims of the complaint to determine the true character of the dispute to be adjudicated." That is, "The mere obtaining of a divorce decree, without more, does not remove the case from the arena of domestic relations and permit the intervention of federal courts to adjudicate issues unaffected by the decree." Also, in *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), the Sixth Circuit found that federal court jurisdiction could be available, in civil rights action by a former husband alleging, among other things, due process violations in the state court divorce proceedings. The court said the matter was more properly characterized not as

domestic relations matter but as a constitutional claim not directly within a domestic relations context. This was so, although the former husband sought a declaration from the district court that state court marital proceedings violated due process and the divorce decree was void. The *Catz* court stated (at 142 F.3d at 291-292, emphasis supplied):

> Further, the declaration Catz seeks would not itself address the merits, or ultimately dispose, of Chalker's divorce petition; she would be free to relitigate her marital status in state court. Finally, Catz is not asking the district court to involve itself in the sort of questions attendant to domestic relations that are assumed to be within the special expertise of the state courts--for instance, the merits of a divorce action; what custody determination would be in the best interest of a child; what would constitute an equitable division of property, and the like. Instead, Catz asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. <u>This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts</u>.

Therefore, Sixth Circuit opinions, combined with decisions of this Court, and considering the significant Due Process contexts involved, do not prevent exercising federal jurisdiction over constitutional interests connected to claims or requests for relief, despite any domestic relations background of the matter.

Petitioners reiterate that they do not seek to relitigate state matters in federal court. Rather, they seek a declaration that refusal by Respondent (and by the Michigan Wayne County Court) to acknowledge the fact of Victor Lommen's paternity violates constitutionally protected parental interests in Joshua, that this refusal to recognize the parentage of

Joshua is damaging to constitutionally protected family interests which the Lommens have in their child, and that Respondent should be enjoined from challenging the fact of this paternity. The ultimate consequences of such a declaration and injunction would be left to litigation in state court.

In addition, other federal courts have recognized federal question jurisdiction in matters with domestic relations contexts. See, e.g., *Hurlman v. Rice*, 927 F.2d 74 (2nd Cir. 1991) (jurisdiction over §1983 action against state troopers who allegedly improperly seized child from plaintiffs' residence, and other claims); *Alsager v. District Court of Polk County*, 518 F.2d 1160 (8th Cir. 1975) (jurisdiction over civil rights action challenging state court or agency's termination of parental rights); *Ingram v. Hayes*, 866 F.2d 368 (11th Cir. 1988) (same for general principles); *McArthur v. Bell*, 788 F.Supp. 706 (E.D.N.Y. 1992) (action involving state court's child support action, noting federal courts have jurisdiction to decide tort, contract, or civil rights questions arising out of domestic relations context, if underlying domestic relations issues are not disputed); *Thomas v. New York*, 814 F.Supp. 1139 (E.D.N.Y. 1993) (jurisdiction over civil rights claims by mother and children against city and against foster care agency over abuse of children in foster care system); *Young v. Francis*, 820 F.Supp. 940 (E.D.Pa. 1993) (suit against state adoption agency by prospective adoptive parents over death of child, federal court generally has jurisdiction over claims of interference with constitutionally protected right of familial association, dismissing case on other grounds). *But see*, *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980), and *Anderson v. State of Colorado*, 793 F.2d 262 (10th Cir. 1986) (no federal review of state custody decision, under §1983).

Once jurisdiction is thus established, federal courts

have jurisdiction to provide relief affecting State proceedings involving the same parties and issues. See, e.g., *Harris County Commissioners v. Moore*, 420 U.S. 77 (1975), at 88-89 (noting generally that federal courts have jurisdiction over claims that state judicial proceedings have deprived moving party of federal constitutional rights, so long as claims are otherwise properly before federal court), and *Michum v. Foster*, 407 U.S. 225 (1972) (same).

D. Supplemental or Pendant Jurisdiction

Petitioners also note that once jurisdiction has been established, the federal court has supplemental jurisdiction over relief relating to state common law. This supplemental jurisdiction (pendent or ancillary jurisdiction) extends to all relevant claims involving state law that come from the same operative facts. (See Judicial Improvements Act of 1990 (see 28 U.S.C. §1367(a)) pertinent text cited in Petition).

Petitioners have not invoked diversity of citizenship jurisdiction (under 28 U.S.C. §1332). Thus, the domestic relations exception to diversity jurisdiction does not apply. They do not seek to "relitigate" the custody situation involving Joshua, in federal court, or seek from the federal court relief which is the province of the state courts. They do not raise less substantial rights than those claimed by prospective parents of foster or yet-adopted children.

Rather, as noted, they contend that refusal by the Michigan Wayne County Court and by Appellee to recognize the parental status of Victor Lommen--and the legal and personal consequences which follow from that lack of recognition--violates Victor Lommen's constitutionally established parental rights. The Michigan court, for reasons known only to it, has declined to accept the fact that Victor Lommen is Joshua's natural father, despite being faced with test results which conclusively this. The Illinois court had no difficulty recognizing this fact and ordering custody--an order

which Respondent voided in the Michigan court.

The Lommens consistently have been deprived of a wholesome and productive parental relationship with Joshua. Joshua will be 18 soon, and time is now running out for them to develop the relationship of mother, father, and son, in these last formative years. Because the 1993 Michigan court custody order by the Michigan court, still in effect, restricts Kim Lommen's visitation with the McIntyre children, including Joshua, to the geographic confines of Michigan, she cannot take her own son to her own home. Thus, Joshua has not set foot in the home of his natural parents in Illinois. With the fact of paternity firmly established, this situation is an egregious and gross violation of the Lommens' constitutionally protected parental rights regarding Joshua.

The federal court thus can consider the Lommens' request for relief that it declare, based on their constitutional right as parents, that Joshua is their natural child, judicially recognizing the undeniable test result, and enjoin John McIntyre's refusal to accept the fact that Joshua is not his natural son. Such relief will provide a substantial measure of legitimacy to the Lommens' custody claims which they would then press in the Michigan Wayne County Court.

Federal jurisdiction exists to provide legal substance to a constitutionally recognized and protected interest. It is of little value to declare the fundamental existence of this interest and say no federal relief is available to enforce it.

It is manifest that Petitioners have a constitutionally recognized parental interest in their own natural child. Their Complaint sufficiently alleges that this right has been violated (contrary to the District Court's conclusion otherwise). The District Court therefore is empowered to exercise jurisdiction to consider Petitioners' claims on the merits and to determine whether the requested relief can be granted.

Therefore, the District Court erred in declining to

accept jurisdiction and in denying reconsideration. The Sixth Circuit erred in affirming that action. Both of decisions contravene opinions of this Court. The Sixth Circuit decision must be reversed and the case remanded with instructions that the District Court should reinstate the Complaint.

II. THE DISTRICT COURT COULD HAVE CONSIDERED THE RECONSIDERATION MOTION ON THE MERITS RATHER THAN DISMISS THE MOTION SOLELY ON TIMELINESS GROUNDS.

Petitioners do not dispute that the reconsideration motion was not filed within 10 days of the date of the District Court's *sua sponte* order dismissing the matter for lack of jurisdiction. Yet, the District Court still could have considered the reconsideration motion on the merits rather than dismissing it as untimely.

The Federal Rules of Civil Procedure do not, in actuality, provide for a motion for reconsideration. Such motions are treated as a motion for new trial or amendment of judgment under Rule 59 (especially Rule 59(e)), or as a motion for relief of judgment under Rule 60 (especially Rule 60(b)). If the motion is filed within 10 days of the judgment or order, it is deemed a Rule 59(e) motion, and if filed after 10 days, it is treated as a Rule 60(b) motion. *Hatfield v. Board of County Commissioners*, 52 F.2d 858 (10th Cir. 1995), and *Burger v. Mays*, 176 F.R.D. 153 (E.D.Pa. 1997).

A Rule 60(b) motion seeks a relief from judgment for various specified grounds, including mistake, new evidence, fraud, or void judgment. Under 60(b)(6), such a motion may seek relief from the judgment "for any other reason justifying relief from the operation of the judgment." A Rule 60(b) motion is to be filed "within a reasonable time."

Petitioners' reconsideration motion sought relief from

the District Court's *sua sponte* order dismissing their Complaint for lack of jurisdiction. This appropriately could have been treated as a motion under Rule 60(b)(6) (contrary to the Sixth Circuit's decision that Rule 60(b) does not encompass the issues raised in the reconsideration motion).

Further, the label or title of the motion given by the moving party is not binding on the court. The court may discard an inappropriate label to render a decision based on the motion's substance, unless recharacterization of the motion would contravene a principle of substantial justice. *Smith v. United States*, 721 F.2d 346 (11th Cir. 1983).

Moreover, the reconsideration motion raised the identical issues of jurisdiction which were raised in the Complaint and in Petitioners' response to Show Cause Order. Jurisdictional matters can be raised at any time, even on appeal. See, e.g., *Airline Professionals Association, etc. v. Airborne, Inc.*, 332 F.3d 983 (6th Cir. 2003) (federal courts under Article III have independent obligation to determine if subject matter jurisdiction exists), and *Ford v. Hamilton Investment Co.*, 29 F.3d 255 (6th Cir. 1994) (subject matter jurisdiction may be raised by any party at any time, including on appeal, even *sua sponte* by the court).

Thus, there was no impediment to the District Court considering the merits of the motion for reconsideration. Its refusal to do so was an abuse of discretion. Although the District Court denied the reconsideration motion on matters of timeliness, it is apparent that the District Court would have denied the reconsideration motion on the merits, if the Court had not decided to deny it on timeliness grounds.

The entire brief history of this matter in the District Court, leading to this appeal, and including the reconsideration motion, focused exclusively on whether the District Court had jurisdiction over Petitioners' Complaint and the relief sought, which as noted, can be raised at any

time. The District Court's denial of the reconsideration presented the same jurisdictional issues.

III. THE DISTRICT COURT NEED NOT ABSTAIN FROM CONSIDERING OR GRANTING THE RELIEF SOUGHT.

Finally, Petitioners state briefly that, assuming jurisdiction may be exercised over their Complaint, the District Court need not abstain from considering the relief sought, under *Younger* (*Younger v. Harris*, 401 U.S. 37 (1979) and *Moore v. Sims*, 442 U.S. 415 (1979)) or under *Rooker-Feldman* (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). The District Court and the Sixth Circuit did not reach these issues, thus they are not precisely before this Court. Petitioners suggest only that, should this Court determine the District Court had jurisdiction, it would impractical for the District Court upon remand to assume jurisdiction but decide it should abstain from consideration of the Complaint. Therefore, abstention could be an appropriate issue to decide at this stage.

Younger abstention involves abstention under principles of comity and federalism, in which a federal court declines to adjudicate a matter otherwise is properly before it. Among the factors in this abstention is whether there is a pending state civil proceeding, whether the state has an overriding interest in deciding the matter which overshadows federal involvement, and whether plaintiffs can raise the same issues in state court which they present in federal court.

None of these factors applies here. There is no pending state civil proceeding. While the state's interest in domestic matters is significant, the fact of this state interest does not prevent federal courts from reaching constitutional matters with a domestic relations background. Also, whether

Petitioners would receive the same or appropriate consideration in state (Michigan Wayne Count) court that they would receive in federal court concerning the constitutional claims made here, is in considerable doubt given the history of this matter to date in State court.
In general, see *Steffel v. Thompson*, 415 U.S. 452 (1974); *Lake Carriers' Association v. McMullan*, 406 U.S. 498 (1972), and *Ankenbrandt, supra*, 504 U.S. 689 (error for district court to have abstained from jurisdiction, since there was no allegation of any pending state court proceeding and the plaintiff had alleged that state court proceedings had ended, prior to filing the federal claims). Also, there are exceptions to *Younger* abstention (extraordinary circumstances, bad faith by the other party in prior state proceedings, unconstitutionality affecting state proceedings). See *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Abstention under *Rooker-Feldman* involves lack of jurisdiction or authority of federal courts to challenge state court decisions, even if the challenge asserts that the state court proceedings were unconstitutional. That is, if the federal action is in the nature of a prohibited "appeal" from a state court judgment, the federal court cannot issue a decision directly challenging the state court action. If constitutional claims involve allegation of a direct constitutional violation in a specific application of a state procedure, statute, or rule, rather than general challenge, the federal court may be prevented from acting if that would challenge the "substance" of an existing state court judgment.

This abstention is not implicated here. Petitioners' due process arguments do not require the federal court to decide the merits of the Michigan court's divorce or custody determinations, only to decide an aspect of that determination affecting their constitutional parental interests. It would then be up to the Michigan courts to decide, following the

issuance of this federal declaratory and injunctive relief, whether custody determinations must be changed. Further, while application of procedures are implicated, this relief does not require federal interposition in pending state action.

There is no impediment by way of abstention doctrines, to federal court exercising jurisdiction in this matter and considering and granting the relief sought by the Lommens. Indeed, the substantial nature of the parental interest and rights which they allege have been violated, and the prior, current, and long term affect of that violation as to their fundamental relationship with their natural child, demands rather than precludes federal intervention.

The Lommens have substantial and established rights in their ongoing relationship with their son which require appropriate recognition by Appellee and, more importantly, by the Michigan Court. Appropriate constitutionally-related federal relief concerning those rights is a totally suitable subject for federal court jurisdiction and action.

Therefore, the District Court should not have declined to exercise jurisdiction and surely should not have done so *sua sponte*, after accepting jurisdiction. Assuming jurisdiction exists, the District Court had authority to grant the declaratory and injunctive relief sought. Abstention doctrines and principles do not preclude the District Court from considering such relief as requested in Petitioners' Complaint.

CONCLUSION

THEREFORE, Petitioners request of this Court that it GRANT their Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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Attorney for Petitioners

No. _____

In The
Supreme Court of the United States

IN RE: JOSHUA LOMMEN,

Petitioner,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX

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EXHIBIT 1: SIXTH CIRCUIT OPINION

NOT RECOMMENDED FOR PUBLICATION

No. 03-2313

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICTOR LOMMEN, natural father of Joshua Lommen, a minor; JOSHUA LOMMEN, a minor, by his natural father Victor Lommen,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
Appellants,	)	
v.	)	
JOHN FRANCIS MCINTYRE, Appellee	)	
	)	OPINION

Before: MARTIN, GILMAN, and FRIEDMAN, Circuit Judges.*

RONALD LEE GILMAN, CIRCUIT JUDGE. Victor Lommen seek a federal declaratory judgment that he is the "natural father" of Joshua McIntyre-Lommen. His complaint was dismissed after

* The Honorable Daniel M. Friedman, Senior United States Circuit Judge with the Court of Appeals for the Federal Circuit, sitting by designation.

the district court concluded that it lacked subject matter jurisdiction. Because Lommen's notice of appeal from the district court's dismissal was not timely filed, however, we reach only the limited question of whether the district court properly denied his motion for reconsideration. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

John and Kim McIntyre were married in Michigan in 1983. Kim began an extramarital relationship in 1991 with Victor Lommen. While still married and living with her husband, Kim gave birth to a son, Joshua, in December of 1991. The McIntyres eventually divorced and Kim was remarried to Lommen. Lommen then sought custody of Joshua, who Lommen maintains is his son.

Following many years of litigation in the Michigan and Illinois state courts regarding the paternity and custody of Joshua, Victor Lommen filed the present action in May of 2003 in the United States District Court for the Eastern District of Michigan. Based on the results of a DNA test, he asked the district court to (1) declare that Lommen is Joshua's natural father, (2) declare that the relationship between Joshua and Victor is constitutionally protected under the First and Fourteenth Amendments, and (3) order McIntyre not to interfere in the exercise of Victor's and Joshua's federal constitutional right.

Shortly after the complaint was filed, the district court issued an order directing Lommen to show cause why the case should not be dismissed for lack of subject matter jurisdiction. The order noted that, on its face "[t]he Complaint alleges traditional state law issues and does not invoke the Court's diversity jurisdiction." Lommen responded, arguing that the case was within the district court's federal question jurisdiction because he was seeking

to "vindicate [his] constitutional right to what has been called the right of parental autonomy or the right to family integrity under the United States Constitution." Observing that Lommen had "responded by citing several United States Supreme Court cases finding a constitutional right of parental autonomy," the district court concluded that Lommen had properly invoked the court's federal question jurisdiction.

Two days later, however, the district court revisited its earlier jurisdictional finding, stating that "[o]n further reflection, the Court reconsiders that decision *sua sponte*, and finds that there is no constitutional right to have the issue of paternity decided by a federal court." The district court then dismissed Lommen's complaint for lack of subject mater jurisdiction. This order was issued on July 10, 2003.

On August 19, 2003, Lommen filed a "Motion for Reconsideration," in which he argued essentially the same points that he had raised in his earlier response to the court's show-cause order. Finding that the motion was filed "well after" the 10-day period allowed under Rule 59(e) of the Federal Rules of Civil procedure, the district court denied Lommen's motion on August 20, 2003. On September 19, 2003, Lommen filed a timely notice of appeal from the denial.

Both parties submitted briefs to this court addressing the merits of whether federal question jurisdiction exists when a party asserts a "federal constitutional right of parental autonomy or family integrity." McIntyre also filed a motion to dismiss for lack of jurisdiction, alleging that Lommen's appeal of the underlying matter was untimely. The motion to dismiss was referred to a panel of this court pursuant to Rule 34(j), Rules of the Sixth Circuit. That panel, composed of Judges Martin, Sutton, and Quist, issued an order on June 14, 2004, concluding that Lommen's "notice of appeal from the district court's judgment was not timely." The panel then

referred the motion to us for consideration of whether "this court nevertheless may have jurisdiction over the limited issue of whether the motion for reconsideration....was properly denied."

II. ANALYSIS

Lommen did not file his notice of appeal until 71 days after the district court's dismissal of his case for lack of subject matter jurisdiction. The Federal Rules of Appellate Procedure require litigants in civil cases to file a notice of appeal "with the district clerk within 30 days after the judgment or order appeal from is entered." Fed. R.App. P. 4(a)(1)(A). But certain post-decision motions, including a motion for reconsideration, toll this 30-day period. *Id.* at 4(a)(4). "[A]ny of the tolling motions must be filed within 10 days after entry of the judgment," however, and Lommen's motion for reconsideration was not filed until 40 days after the district court's dismissal of his action. *See Myers v. Ace Hardware*, 777 F.2d 1099, 1103 (6th Cir. 1985) (holding that "a post-decision motion only tolls the 30-day requirement if it is timely filed"). Because Lommen failed to appeal the district court's dismissal order within 30 days and because he did not timely file his motion for reconsideration, we are without jurisdiction to hear his appeal from the district court's dismissal of his complaint for lack of subject matter jurisdiction. *See Searcy v. City of Dayton*, 38 F.3d 282, 287 (6th Cir. 1994) ("A timely notice of appeal is mandatory and jurisdictional prerequisite which this court can neither waive nor extend.").

In any event, Lommen is essentially seeking a federal declaration that he is Joshua's father, and matters of paternity are for state courts. *See Firestone v. Cleveland Trust Co.*, 654 F.3d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guide of a federal question action, a suit whose substance is domestic relations generally will not be determined in a

federal court."). We therefore dismiss Lommen's appeal insofar as it challenges the merits of the district court's dismissal of his complaint for lack of jurisdiction.

Lommen, however, contends that we may hear his appeal because he filed timely notice after the district court's denial of his motion for reconsideration. But McIntyre maintains that we lack jurisdiction in the present case because Lommen's appeal from the district court's denial of a motion for reconsideration "is an appeal from a normally nonappealable order." *See Walker v. Mathews*, 546 F.2d 814, 817 n. 1 (9th Cir. 1976); *see also Md. Tuna Corp. v. MS Benares*, 429 F.2d 307, 316 (2nd Cir. 1970) (stating that denials of motions for reconsideration "do no more than deny a motion for reargument, and such orders are generally not appealable."). The cases cited by McIntyre, however, predate the Supreme Court's clear pronouncement in *Stone v. INS*, 514 U.S. 386, 401 (1995), that "[t]he denial of the motion [for reconsideration' is appealable as a separate final order." Accordingly, this court has held that appeals from orders denying motions for reconsideration are within our appellate jurisdiction. *See Hood v. Hood*, 59 F.3d 40, 42 (6th Cir. 1995).

In reviewing Lommen's appeal from the district court's denial of his motion for reconsideration, we are mindful that the scope of our appellate review is quite narrow. *Id.* ("On an appeal from the denial of a motion [for reconsideration and] for relief from the judgment under Rule 60(b), 'the Court of Appeals may review the ruling for abuse of discretion...[,but] an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.'") (*quoting Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n. 7 (1978)). We therefore do not reach the underlying dismissal by the district court based on lack of subject matter jurisdiction, but instead review the district

court's denial of the motion for reconsideration for an abuse of discretion.

The district court dismissed Lommen's complaint for lack of subject matter jurisdiction on July 10, 2003. Lommen filed his motion for reconsideration 40 days later, on August 19, 2003. Because a motion for reconsideration brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure must "be filed no later than 10 days after entry of the judgment," we conclude that the district court did not abuse its discretion in denying Lommen's motion as untimely.

When a motion for reconsideration is filed after the 10-day time limitation imposed by Rule 59(e), however, a court may construe the motion as having been filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *See Peake v. First National Bank & Trust Co. of Marquette*, 717 F.2d 1016, 1020 (6th Cir. 1983) (approving the district court's decision to treat an untimely Rule 59(e) motion as a timely motion for reconsideration pursuant to Rule 60(b)). The three-judge panel of this court that first considered McIntyre's motion to dismiss declared that Lommen's motion for reconsideration could properly be construed as a Rule 60(b) motion, and the panel suggested that we consider whether the motion was properly denied by the district court.

"As a prerequisite to relief under Rule 60(b), a party must establish that the facts of its case are within one of the enumerated reasons contained in Rule 60(b) that warrant relief from judgment." *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993). Because Lommen's motion does not come within the first five grounds specified in the rule, it presumably falls under subdivision (6), which permits a district court to grant a motion for relief from judgment for "any other reason justifying relief from the operation of the judgment." But a motion under Rule 60(b)(6) may be granted

"only in exceptional or extraordinary circumstances." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

Lommen's motion for reconsideration does nothing more than restate the arguments contained in his earlier response to the court's show cause order. Although "this approach may be appropriate for an appeal on the merits...it fails to establish that the facts of [Lommen's] case are within one of the enumerated reasons contained in Rule 60(b)." *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 543 (6th Cir. 2004). Because Lommen's motion for reconsideration presented nothing new, we conclude that the district court did not abuse its discretion in denying his motion. *See id.* at 544 (affirming district court's denial of a rule 60(b)(6) motion where the "motion merely rephrases the allegations contained in the complaint and presents no new arguments").

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

EXHIBIT 2: DISTRICT COURT'S SHOW CAUSE ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VICTOR LOMMEN, et al.,

Petitioners,

vs.
Case No. 03-71892

JOHN FRANCIS McINTYRE,
HON. GEORGE CARAM STEEH

Respondent

_____/

ORDER TO SHOW CAUSE

Petitioners filed a complaint in the above captioned case in this Court on May 16, 2003. It is not clear to the Court that Petitioners have satisfied the requirements of federal question jurisdiction. Therefore,

On or before June 16, 2003, Petitioners shall SHOW CAUSE in writing why this case should not be dismissed for lack of federal jurisdiction. The Complaint alleges traditional state law issues and does not invoke the Court's diversity jurisdiction.

This Order to Show Cause constitutes notice under Local Rule 41.2 of the Local Rules for the Eastern District of Michigan of the Court's intention to dismiss this case on its own motion for lack of subject matter jurisdiction, unless Petitioners can demonstrate that the Court does have jurisdiction in this case. Accordingly,

IT IS HEREBY ORDERED that Petitioners show cause in writing, on or before June 16, 2003, why this case should not be remanded for lack of jurisdiction. Respondent may reply within 7 days from the time they receive Petitioner's response.

/s/
GEORGE CAREM STEEH
United States
District Judge

Dated: 30 May 2003

EXHIBIT 3: DISTRICT COURT'S ORDER DISMISSING SHOW CAUSE ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VICTOR LOMMEN, et al.,

Petitioners,

Case No. 03-71892
HON. GEORGE
CARAM STEEH

_____/

ORDER DISMISSING SHOW CAUSE

The court issued an Order to Show Cause on May 30, 2003 ordering petitioners to show cause why their Complaint should not be dismissed for lack of subject matter jurisdiction. Petitioners responded by citing several United States Supreme Court cases finding a constitutional right of parental autonomy. These cases have found a constitutionally protected right to "bring up children" grounded in the Fourteenth Amendment's Due Process Clause and the First Amendment's Right of Association. See, Roberts v. United States Jaycees, 468 U.S. 609, 617-20 (1984); Santosky v. Kramer, 455 U.S. 745, 753 (1982). Therefore, it appears that petitioners' cause of action seeking a declaration that Lommen is the natural father of Joshua McIntyre presents a federal question. Plaintiff having satisfied the court's Order to Show Cause, now therefore,

IT IS HEREBY ORDERED that the Order to Show Cause be dismissed.

/s/
GEORGE CAREM STEEH
United States
District Judge

Dated: 8 July 3003

EXHIBIT 4: DISTRICT COURT'S ORDER RECONSIDERING SHOW CAUSE ORDER AND DISMISSING FOR LACK OF JURISDICTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VICTOR LOMMEN, et al.,

Petitioners,

Case No. 03-71892
HON. GEORGE
CARAM STEEH

/

ORDER RECONSIDERING
DISMISSAL OF SHOW CAUSE
AND DISMISSING CASE
FOR LACK OF JURISDICTION

The court issued an Order to Show Cause on May 30, 2003 ordering petitioners to show cause why their Complaint should not be dismissed for lack of subject matter jurisdiction. Petitioners responded by citing several United States Supreme Court cases finding a constitutional right of parental autonomy. These cases have found a constitutionally protected right to "bring up children" grounded in the Fourteenth Amendment's Due Process Clause and the First Amendment's Right of Association. See, Roberts v. United States Jaycees, 468 U.S. 609, 617-20 (1984); Santosky v. Kramer, 455 U.S. 745, 753 (1982). Based on these such cases, the Court found that petitioner had presented a federal question. On further reflection, the Court reconsiders that decision *sua sponte*, and find that there is no constitutional right to have the issue of paternity determined by a federal

court.

State statutes regulate paternity, and certain presumptions about paternity follow from divorce laws. Furthermore, there is a wealth of case law that has developed from the application of such laws and statutes in each state. Matter of paternity are for the state courts, at least initially.

While the Constitution provides certain protections to parental rights, the complaint at issue does not allege that any of these rights have been violated. If there is a challenge to a paternity law's constitutionality after it has been applied to a particular individual, such challenge might appropriately be made in the federal courts. However, that is not the case with the petitioner's cause of action seeking a declaration of paternity in this case.

Now therefore,

IT IS HEREBY ORDERED that the complaint in this matter be dismissed for lack of subject matter jurisdiction.

/s/
GEORGE CAREM STEEH
United States
District Judge

Dated: 10 July 3003

EXHIBIT 5: DISTRICT COURT'S ORDER DENYING MOTION FOR RECONSIDERATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VICTOR LOMMEN, et al.,

Petitioners,

Case No. 03-71892

HON. GEORGE CARAM STEEH

_____/

ORDER DENYING MOTION FOR RECONSIDERATION

This matter has come before the Court on petitioners' motion for reconsideration of the July 10, 2003 order dismissing the case for lack of subject matter jurisdiction. Under Local Rule 7.1(g)(1), a motion for reconsideration must be filed within 10 days after entry of the judgment or order. Petitioners filed their motion for reconsideration on August 19, well after the July 29, 2003 cutoff date for such motions. Now, therefore,

IT IS HEREBY ORDERED THAT petitioners' motion for reconsideration is DENIED.

/s/
GEORGE CAREM STEEH
United States District Judge

Dated: 20 August 3003

EXHIBIT 6: SIXTH CIRCUIT ORDER CONSIDERING APPEAL JURISDICTION

No. 03-2313
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICTOR LOMMEN, natural father of Joshua Lommen, a minor; JOSHUA LOMMEN, a minor, by his natural father Victor Lommen,	)	
Petitioners,	)	ORDER
v.	)	
JOHN FRANCIS MCINTYRE,	)	
Appellee	)	

Before: MARTIN and SUTTON, Circuit Judges; QUIST, District Judge*

The appellants filed a complaint in district court seeking declaratory and other relief. By order of July 10, 2003, the district court dismissed the complaint for lack of jurisdiction. The appellants moved for reconsideration of that decision on August 19, 2003. That motion was not filed within ten days of the judgment and therefore had no tolling effect upon the time for filing the notice of appeal.

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* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

Fed. R. App.P. 4(a)(4). Therefore, the appellee moves to dismiss this appeal as untimely.

Although the notice of appeal from the district court's judgment was not timely, this court nevertheless may have jurisdiction over the limited issue of whether the motion for reconsideration -- construed as a Fed. R. Civ. P. 60(b) motion --was properly denied. *See Peake v. First National Bank & Trust Co. of Marquette*, 717 F.2d 1016, 1020 (6th Cir. 1983). We note that this appeal is fully briefed and otherwise ready for disposition.

Therefore, the motion to dismiss is referred to the merits panel for consideration along with the appellate briefs.

ENTERED BY ORDER OF THE COURT

Dated: June 14, 2004

EXHIBIT 7: TEXT OF PERTINENT STATUTES OR RULES

United States Constitution, Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising out of the Constitution, laws, or treaties of the United States.

28 U.S.C. §1367. Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention or additional parties.

(b) * * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) * * *

(e) * * *

28 U.S.C. §2201. Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal remedies of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) * * *

EXHIBIT 8: COMPLAINT

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
DETROIT DIVISION

IN RE: VICTOR LOMMEN	*
1017 Richmond Street	
Joliet, Illinois 60435	*
AND	
JOSHUA LOMMEN, a minor,	*
by his natural father,	
Victor Lommen	*
8651 Hazelton	
Dearborn Heights,	*
Michigan 48127	Civil Action
	*
PETITIONERS	No. 03-71892
SERVE ALSO:	*
JOHN FRANCIS MCINTYRE	
8651 Hazelton	*
Dearborn, Michigan 48127	
	*

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Petitioners, Victor Lommen (Lommen) and his son Joshua McIntyre (Joshua) represent as follows:

JURISDICTION & VENUE

1. This Court's federal jurisdiction is invoked under 28 U.S.C. §1331(a).

2. Venue is properly laid in this District because Joshua and John Francis McIntyre are residents of the District.

FACTUAL BACKGROUND

3. On December 26, 1991, Joshua was born during the time that Kim McIntyre, now Lommen was married to John McIntyre (McIntyre).

4. McIntyre is not the father of Joshua.

5. Victor Lommen is the natural father of Joshua.

6. On April 18, 1994, an Immunogenetic Blood Testing Study or DNA test was performed on Lommen and Joshua. The test results established the probability that Lommen was Joshua's natural father to a 99.999+ degree of certitude. See Exhibit 1 attached and incorporated into this Complaint.[1]

7. McIntyre knew from the date of Joshua's birth that he was not Joshua's natural father because he and Kim had not had sexual relations for years prior to Joshua's birth.

8. In October 1992 McIntyre and Kim were divorced by order of the Circuit Court of Wayne County, Michigan.

9. On January 6, 1993, Kim and Lommen were married.

CONTROVERSY

10. A controversy exists over who is Joshua's natural father.

11. McIntyre has refused to acknowledge that Lommen is Joshua's natural father. He has also refused to accept the results of the DNA test.

12. The controversy has constitutional dimensions because neither Lommen or Joshua have been allowed to assert their federal constitutional right of parental autonomy or family integrity in various court hearings in Wayne County, Michigan, as explicated in numerous United States

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[1] Note: The Exhibit referenced was not so attached.

Supreme Court decisions, including, *inter alia*, *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1971) and *Stanley v. Illinois*, 405 U.S. 645 (1972), a right grounded in the First Amendment's broad right of association and the Fourteenth Amendment's general substantive due process protections. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-620 (1984); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

[11]. The Petitioners ask that this Court:

a. Declare that Lommen is Joshua's natural father;

b. Declare that the relationship between Joshua and Victor is constitutionally protected under the First and Fourteenth Amendments;

c. Order McIntyre not to interfere in the exercise of Victor's and Joshua's federal constitutional right.

Respectfully submitted,

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